Filed 10/30/12 P. v. Kwon CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN HYUN KWON, Defendant and Appellant.	B224094 (Los Angeles County Super. Ct. No. BA347805) ORDER MODIFYING OPINION, DENYING REHEARING AND DENYING PUBLICATION [no change in the judgment]

THE COURT:

It is ordered that the opinion filed herein October 4, 2012, be modified as follows:

1. On page 6, the third full paragraph, beginning "The record reveals" is deleted, and the following paragraph is inserted in its place:

On this record, the quantification and extraction processes are apparently merely interim steps that enabled the testifying expert to analyze the samples provided to her by the police, and to testify to the results of her analysis. There is no evidence that the results reached by Murray, matching DNA profiles from various objects, could have been affected by errors or misdeeds of another analyst or technician in the extraction or quantification procedures used to obtain the DNA profiles that she analyzed. Murray testified, as an expert, that the quantification process could not have affected her results; She was not asked whether her testimony would have been the same with respect to the

process of extraction on one of the samples that had been done by another technician, although Kwon had been free to examine her on that subject. From this it is plain that the results of the extraction and quantification processes cannot be characterized either as the functional equivalent of ex parte in-court testimony of an absent expert, or equivalent to formal testimony—essential under Justice Thomas's analysis in *Williams, supra*, to trigger Kwon's right to confront the absent technicians involved in those processes. (132 S.Ct. at pp. 2242-2244.)

There is no change in the judgment.

Appellant's petition for rehearing is denied.

Respondent's request for publication is denied.

MALLANO, P. J. ROTHSCHILD, J. CHANEY, J.

Filed 10/4/12 P. v. Kwon CA2/1 (unmodified version)
Opinion following remand from U.S. Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN HYUN KWON, Defendant and Appellant.	B224094 (Los Angeles County Super. Ct. No. BA347805)

APPEAL from judgment of the Los Angeles Superior Court. George G. Lomeli, Judge. Affirmed.

Laura S. Kelly, by appointment of the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Joseph P. Lee and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

By letter dated July 31, 2012, this court has received the mandate of the Supreme Court of the United States dated June 29, 2012, vacating the judgment filed in this case on March 30, 2011, and remanding the case for further consideration in light of *Williams v. Illinois* (2012) 567 U.S. ___ [132 S.Ct. 2221, 183 L.Ed.2d 89] (*Williams*). After considering the decision in *Williams* and the parties' responses to our invitation to address its impact on our former opinion, we have concluded that the vacated judgment affirming the appellant's conviction should be reinstated, with the following additional discussion.

The facts are set forth in this court's now-vacated former opinion. In brief, appellant Steven Kwon was charged with the murder of Min Woo Cho, a friend and former roommate, following a night of drinking. He was convicted of second degree murder (Pen. Code, § 187, subd. (a)), with findings that he personally used a firearm (Pen. Code, § 12022.53, subd. (b)), that he personally and intentionally discharged a firearm (Pen. Code, § 12022.53, subd. (c)), and that in doing so he caused great bodily injury and death (Pen. Code, § 12022.53, subd. (d)). Kwon contended on appeal that his rights under the Sixth Amendment to the United States Constitution to confront the witnesses against him were violated by the admission at his trial of the testimony of Lindsay Murray, an expert DNA analyst at Bode Technology in Virginia, who testified to her conclusion that three DNA samples Bode had received from the Los Angeles Police Department had come from the same person.

According to Murray's testimony, DNA typing is a process in which DNA is extracted from a sample, and through laboratory processes of quantification and amplification a DNA profile is obtained. Portions of the profile are analyzed and compared with the profiles obtained from other sources, and conclusions are then drawn about the likelihood that the samples came from the same or different people. Murray testified that she had herself conducted the process of extracting the DNA from one of the samples that Bode had received from the Los Angeles Police Department, while others at Bode had done the extraction process for the other samples. And although Murray had conducted the chemical amplification and the analysis of the DNA that had been

extracted from the three samples, others at Bode had done the process of quantifying the DNA for amplification.

Kwon contends that because Murray had not quantified the three samples, and was not involved in the extraction process for two of the samples, under *Williams* his confrontation rights were violated by his inability to confront and cross-examine those at Bode who had conducted those steps in the process. We conclude otherwise. Under *Williams*, neither Murray's testimony, nor the Bode Technology reports admitted into evidence in connection with her testimony, constitute the sort of testimonial evidence that would trigger Kwon's rights under the confrontation clause.

The issue before the Supreme Court in *Williams* was whether the Sixth Amendment confrontation clause is violated by an expert's testimony referring to a DNA profile as having been produced from semen found on the victim. (*Williams, supra,* 132 S.Ct. at p. 2227.) An expert had testified in the defendant's bench trial, based on business records, that semen from the rape victim's vagina had been sent for analysis to an independent accredited laboratory, and that the DNA profile produced by that laboratory matched a DNA profile produced by the state's police laboratory from a sample of the defendant's blood. (*Id*. at pp. 2227, 2229.) The Supreme Court affirmed the defendant's conviction.

A majority of the court concluded that the expert's statement that the DNA profile from semen found in the victim's vagina matched that from the defendant's blood did not violate the confrontation clause. A plurality (Justice Alito, joined by Chief Justice Roberts and Justices Kennedy and Breyer) found that the expert's statement that the profile had come from the semen found in the victim was not "testimonial" such that it triggered the defendant's confrontation rights, because it had not been offered for its truth; but as merely a premise on which the expert had based her opinion that the two DNA profiles matched, it was (at least in a bench trial) not likely to be misunderstood as a substitute for chain-of-custody evidence establishing the sample's source.

Significantly, the plurality also concluded, as an independent basis for its opinion, that the confrontation clause applies only to "'ex parte in-court testimony or its functional

equivalent,'" of the sort that is tantamount to the abuses that gave rise to the right of confrontation. (*Crawford v. Washington* (2004) 541 U.S. 36, 51; see *Williams, supra,* 132 S.Ct. at p. 2243-2244.)[1]

The expert's testimony in *Williams* came within neither of these categories. The semen sample had been taken not to accuse the defendant, but to find the at-large rapist; and the expert's confirmation of its source was not a formalized testimonial statement, "'ex parte in-court testimony or its functional equivalent.'" (*Crawford v. Washington, supra,* 541 U.S. at p. 51; see *Williams, supra,* 132 S.Ct. at pp. 2242-2244.)

Justice Thomas's concurring opinion in *Williams* rejected the first ground relied upon by the plurality, agreeing with the dissenters that the challenged testimony had been admitted for its truth. (132 S.Ct. at pp. 2255, 2266-2268.) But he nevertheless concurred in the plurality's conclusion that the confrontation clause was not implicated. The statement lacked the "indicia of solemnity" that are hallmarks of a testimonial report. (*Williams, supra,* 132 S.Ct. at pp. 2255-2261.)

Justice Thomas's concurring opinion is the key to the application of *Williams* to the case at hand, because it supplies the fifth vote for the result reached by the majority, based on substantially narrower grounds than those expressed in the plurality opinion. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds . . . .' [Citation.]" (*Marks v. United States* (1977) 430 U.S. 188, 193; see *Del*

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[1] In *Crawford v. Washington, supra,* 541 U.S. 36, the Supreme Court had articulated a "core class of 'testimonial' statements" covered by the confrontation clause (*id.* at p. 51), including "'ex parte in-court testimony or its functional equivalent— that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial' [citation]." (*Id.* at pp. 51-52.)

Monte v. Wilson (1992) 1 Cal.4th 1009, 1023.) For our purposes, the result in *Williams* therefore is the narrow ground on which a majority of five justices (the plurality, and Justice Thomas) agreed: Evidence that lacks indicia of solemnity and formality—"'ex parte in-court testimony or its functional equivalent'"—does not trigger the defendant's right to confrontation. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 51; see *Williams*, *supra*, 132 S.Ct. at p. 2243-2244, 2255-2261.)[2]

In this case, the evidence challenged by Kwon undeniably lacks the requisite indicia of solemnity and formality. Murray testified on direct examination that the DNA profiles she analyzed and compared involved DNA that had been extracted and quantified by others at Bode, and under cross-examination she described the processes used at Bode for the extraction and quantification processes, as well as the amplification of the extracted DNA she had done in order to obtain a quantity sufficient for analysis. While her direct examination by the prosecution identified the portions of the procedures that had been done by other analysts, it did not include any results or conclusions (testimonial or otherwise) of any nontestifying analyst. And while the preliminary processes of extraction and quantification produced DNA of suitable quantity for her to analyze and compare, nothing in her testimony indicated that her analysis or conclusions of the resulting profiles rested on any reports of results about which the technicians involved in those procedures might testify.

Murray's description of the laboratory procedures involved in extraction and quantification of DNA samples was not "testimonial" in any sense understood by the five-justice majority that had affirmed the *Williams* decision. Neither Murray's description of the laboratory procedures involved in extraction and quantification of DNA samples, nor her report that included documentation of those procedures,

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[2] Justice Thomas's concurring opinion in *Williams* did not address—nor do we—the manner in which this test might apply when the challenged evidence is indispensible to the proof for an essential element of the crime with which the defendant is charged, an issue not present here. (See *Melendez-Diaz* v. *Massachusetts* (2009) 557 U. S. 305, 323, 330 [129 S.Ct. 2527, 174 L.Ed.2d 314] (conc. opn. of Thomas, J.) [challenged evidence was created solely to supply proof of the crime].)

constituted the functional equivalent of ex parte in-court testimony from the nontestifying analysts and technicians at Bode who were involved with those portions of the DNA testing process. (See *Williams*, *supra*, 132 S.Ct. at pp. 2228, 2243.)

In this case, the DNA evidence was not presented through a certified report whose author was unavailable for cross-examination, or through the testimony of a supervising technician who had not himself or herself conducted the analysis. Here, the prosecution presented the results of the analysis and comparison of DNA profiles through the direct testimony of the expert analyst who had herself analyzed and compared the profiles. Her certified report was made available for examination, and she was available for cross-examination. It is true that some who had been involved in the preparation of the profiles for analysis were not available for cross-examination; but that was not required. In *Melendez-Diaz* v. *Massachusetts*, *supra*, 557 U. S. 305, the Supreme Court held that in order to satisfy the right to confrontation, not everyone "who laid hands on evidence must be called" as a witness. (*Id.* at p. 311, fn.1.) Nothing in the *Williams* decision indicates an intention to retract or overrule that observation.

To provide her expert opinion analyses and comparisons of the various DNA profiles, Murray did not need to refer to or to testify about the extraction or quantification steps that had been done by other analysts (nor, for that matter, about the amplification step she had done). She confirmed the prosecution's representations to the court that she would testify "to analysis that she personally conducted and give conclusions based on the analysis that she personally conducted," without relying on anyone else's analysis.

The record reveals no evidence or reason to conclude that the results reached by Murray were affected by the results of another analyst or technician in the extraction or quantification procedures used to obtain the DNA profiles that she analyzed. Murray testified, as an expert, that they could not have been, and we cannot speculate or assume otherwise.

In his concurrence with the plurality opinion in *Williams*, Justice Breyer discusses the difficulty of determining exactly who may be required to present DNA test results without encroaching on the protections for which the right to confrontation was granted.

As he notes, a dozen or more different laboratory experts may be required for a typical DNA profile comparative analysis, each of whom "may make technical statements (express or implied) during the DNA analysis process that are in turn relied upon by other experts." (*Williams*, *supra*, 132 S.Ct. at p. 2252 (conc. opn. of Breyer, J.).) And to Justice Breyer's note we add the observation that many other technicians may also have duties that might be critical to the reliable operation of such a laboratory, including duties ranging from labeling and record-keeping, to chemical storage, to bottle washing and sterilization. Errors or misconduct with respect to any of these functions (and certainly others as well) conceivably might affect the ability of a laboratory to reach and report reliably correct results; yet no one suggests that every technician must be produced to validate the laboratory's work product.[3]

Which of these various experts and technicians a defendant may be entitled to confront and cross examine may in some circumstances remain uncertain.[4] (See

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[3] For example, in a California case cited by the dissenters in *Williams*, an expert analyst testifying to DNA comparisons had discovered a mislabeling error that meant that what she had initially testified was a match with the defendant's blood showed no such thing; it showed only a match with the victim's blood, and provided no evidence connecting the defendant to the crime. (See *Williams*, *supra*, 132 S.Ct. at p. 2264 (dis. opn. of Kagan, J.).) And in *Williams*, the witness whose presence was claimed by the defendant to be missing was someone with personal knowledge of the sample's source, not an analyst or technician involved in the DNA typing process. (*Id.* at p. 2227.)

[4] As Justice Breyer put it: "Once one abandons the traditional rule [that experts may rely on otherwise-inadmissible statements and opinions of a kind that such experts normally rely on], there would seem often to be no logical stopping place between requiring the prosecution to call as a witness one of the laboratory experts who worked on the matter and requiring the prosecution to call *all* of the laboratory experts who did so. . . . The reality of the matter is that the introduction of a laboratory report involves layer upon layer of technical statements (express or implied) made by one expert and relied upon by another. Hence my general question: How does the Confrontation Clause apply to crime laboratory reports and underlying technical statements made by laboratory technicians?" (*Williams*, *supra*, 132 S.Ct. at p. 2246.)

Williams, *supra*, 132 S.Ct. at pp. 2246, 2252 [Breyer, J., conc.].) Here, however, the potential for uncertainty is absent. The presentation of the DNA evidence through the testimony of Murray—the expert analyst who had herself analyzed and compared the subject profiles—and her availability for cross-examination by Kwon, was sufficient. The absence of all the analysts and technicians whose efforts contributed to the process of preparing the samples for analysis did not deny Kwon his constitutional rights to confront and cross-examine his accusers.

DISPOSITION

The judgment is affirmed.

CHANEY, J.

We concur:

MALLANO, P.J.

ROTHSCHILD, J.